SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1971

~~No. 1885~~ 70-337

HY-LAN FURNITURE, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF FOR PETITIONER IN REPLY

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Hy-Lan Furniture, Inc. ("the Company") respectfully submits this brief in further support of its petition for a writ of certiorari to the Fourth Circuit Court of Appeals and in reply to the brief of the National Labor Relations Board ("the Board") opposing the issuance of said writ.

Introduction

The magnitude of the errors below is sharply pointed up by the Board's own brief which itself confirms that the enforcement of a bargaining order in the case at bar will have the untoward effects of:

i) forcing upon several hundred employees a union which they indisputably do not want;

ii) radically broadening the "extension of the certification year" doctrine to enable a union, after the certification year has expired, to immunize itself from the employees and thwart their wishes; and

iii) substantially eroding the absolute proscription of the National Labor Relations Act against prosecution of stale unfair labor practices.

In arguing that a writ of certiorari should not issue, it is unfortunate though perhaps unavoidable that the Board has had to ignore controlling decisions of this Court and the various Courts of Appeal; has found it necessary to tuck important legal issues into footnotes or not deal with them at all; and has set forth as "findings" numerous matters which are totally without support in the Record.

In response to the Board's Statement.

The Board's opposing brief confirms that there is no dispute as to the following facts:

1. The Company withdrew recognition of the Union 13½ months after the Union was certified. Withdrawal was based upon a written petition by 215 of 382 employees stating that they no longer wanted the Union to represent them.*

2. The Union's affidavit in support of the unfair labor practice charge contained nothing to indicate that the

* There is no evidence that any signature had been involuntarily obtained. Any such suggestion in the Board's brief (p. 5) and in the Trial Examiner's decision (A10a) is improperly based solely upon a statement by Union representative Woodall that he had been told by one Beaver that the latter had been told by an unidentified person that some employees had been promised benefits if they signed, and reprisals if they did not sign, an unidentified "paper". Obviously such hearsay reporting of non-specific hearsay has no probative force, even under the relaxed evidentiary standards of administrative hearings. *NLRB* v. *Amalgamated Meat Cutters, Local 127*, 202 F. 2d 671 (9th Cir. 1953).

Company had failed to supply any information necessary for bargaining. The affiant himself later testified that he understood that the purpose of the affidavit was "to support the charges that had been filed," and that it recited everything that had occurred except the "little details."

3. The Board's lengthy complaint contained only one reference to an alleged refusal to furnish information: in two lines of one subparagraph, it was alleged that subsequent to August 28, 1968 (the statutory cut-off date), the Company refused to furnish job classifications and wage rates.

4. Complete wage rates in fact had been furnished previously to the Union in May, 1968. As for job classifications, their establishment per the Union's own demand, was to be a subject of collective bargaining since the Company had never previously maintained such classifications. In any event, the Company furnished the Union with a complete list of job descriptions as soon as the Union indicated that this substitute information would suffice for bargaining purposes.

5. The *only* request for information subsequent to August 28, 1968 (the statutory cut-off date) was on October 31 when, in response to a *Company* inquiry, the Union asked for descriptions of the employees' jobs, pension plan information, and an updating of the previously furnished wage rates and hiring dates. The job descriptions and complete pension information were provided in full by the time the parties next met on November 25. The wage rates and hiring dates were not updated. However, the Trial Examiner specifically found that the lack of "fresh" wage data (which related to only one-third of the employees) did not impede bargaining. As for hiring dates, it is undisputed that the Union knew the precise dates for two-thirds of the employees, and knew that the remaining

one-third had all been hired within the previous few months. Thus, it must be concluded that the Union's October 31 request for information was fulfilled in every material respect within a very short period of time.

6. The Union's satisfaction with the bargaining information which it received in response to its October 31 request was evidenced by the facts that: i) at no time after the parties next met on November 25 did the Union indicate that it had received incomplete information or request any further information; and ii) a month or so later, the Union requested withdrawal of a then pending unfair labor practice complaint, itself based upon an alleged failure by the Company to supply bargaining information. The complaint was withdrawn.

7. Bargaining sessions were held throughout 1968 in February, April, May, July, September, October, November, and December. Another meeting was held in January, 1969. There is no evidence that the parties had not successfully negotiated at any of these meetings. On the contrary, it was unanimously agreed by everyone who had observed the situation—*i.e.*, the chief Union negotiator, the Company negotiator, the Trial Examiner in the prior unfair labor practice proceeding, and the Trial Examiner herein—that "substantial progress toward reaching an agreement had been made" (A8a-9a). The Trial Examiner herein described the Company's bargaining as "in good faith" (A16a). The parties reached agreement on numerous Union proposals.

8. Four days after the Company withdrew recognition based on the employees' written rejection of the Union, a formal decertification petition was filed with the Board. The petition was never entertained on the merits. Eventually it was dismissed after the Board, in the proceeding at bar, ordered the Company to continue to bargain with the minority Union.

In the face of the foregoing undisputed facts, the Board has concluded, rather remarkably, that there were "repeated refusals" subsequent to August 28, 1968 (the statutory cut-off date) to furnish information "fundamental to the bargaining process;" that "the Union was in no position to engage in meaningful negotiations;" and that the Company, despite the employees' petition, "cannot be heard to question the Union's continued majority status" (Board Br. 6-7).

Of course, not one of these conclusions may be drawn from the Record. This is demonstrated not only by the undisputed facts recited above, but also by the Board's own brief which fails to point to a single fact supporting the Board's ill-founded conclusions. Conclusory statements may not be substituted for evidence which does not exist. Nor may the Board cure the lack of evidence by emphasizing immaterial facts such as the negotiations relating to the withdrawal of the prior unfair labor practice charge (Board Br. 3-4) and the events preceding the August 28, 1968 statutory cut-off date (Board Br. 2-3). Such an approach is itself a testament to the weakness of the Board's position.

The only conclusion which may be reached on any reading of the Record is that there was no refusal and no failure at any point during the relevant period of time to supply any information necessary to bargaining. The only information request during this period—on October 31—was promptly filled in every material respect as evidenced by the admitted "substantial progress" in bargaining which occurred thereafter (A7a).

In response to the Board's Argument.

The decisions below are "pegged" upon i) an alleged refusal to provide job classification information from August 28 to October 31, 1968 (A13a), and ii) an alleged

refusal to supply wage rate and hiring date information for one-third of the employees from October 31, 1968 until February 20, 1969 when recognition was withdrawn (A14a-15a).

A careful reading of the Board's brief to this Court reveals that the Board has abandoned any attempt to justify the first finding. The Board presumably has recognized that the finding may be sustained *only* if the May, 1968 request for job classifications is somehow deemed to have been automatically continued into the post-August 28 period—a position which is untenable in view of the holdings of *Machinists' Local 1424* v. *NLRB*, 363 U.S. 411 (1960) and *NLRB* v. *Electric Furnace Co.*, 327 F.2d 373 (6th Cir. 1964) which categorically reject the "continuing violation" theory as a means of avoiding the strictures of the six-month unfair labor practice statute of limitations. The simple fact is that there were no requests for job classifications from early May until October 31, at which time the Union agreed to accept job descriptions in lieu of classifications. Complete job descriptions were provided shortly thereafter.

All that is left, therefore, to support the Board's drastic order compelling the Company to bargain with a minority union after the expiration of the certification year is the finding that from October 31 to February 20, the Company failed to update the wage rate and hiring date information previously supplied in May.* The Board argues that this information "was necessary to enable it [the Union] to engage in meaningful contract negotiations." The Board then speculates that "successful bargaining" was "delayed," thereby "induc[ing] employees to withdraw from the Union" (Board Br. 7).

The argument is specious and is made possible only by the Board's belated rejection, never heretofore made, of

* The Board's complaint had alleged nothing concerning hiring date information.

the Trial Examiner's contrary findings (see Board Br., p. 7, note 3), and by the Board's further rejection of the unanimous testimony of all the witnesses and the opinions of the two Trial Examiners that the Company had bargained in good faith; that "substantial progress" was made; and that agreement was reached on many Union proposals. In view of these facts and the further fact that the Union had received complete wage rate and hiring date information in May, there is no merit to the Board's statement about "delay" in "successful bargaining" being attributed to events occurring within the six month limitations period. Such charges must be viewed as nothing more than an advocate's puffing that is without any Record support.

Nor is there any merit to the Board's claim that the employees' disenchantment with the Union was caused by the Company. The fact is that the Record is silent as to the cause of the employees' petition for decertification. The Board should not now be permitted to substitute speculation for the evidence which the Board failed to adduce at the hearing, despite its burden of proof. All that may be concluded at this stage of the proceeding is that there probably were as many reasons for the employee dissatisfaction as there were signatures on the petition. Perhaps the Union had not exhibited sufficient vigor. Perhaps the Union had done certain things which offended some of the employees. Perhaps there had been an experience at neighboring plants which caused the employees to believe that excessive union demands could be counterproductive. Perhaps the Union in its organizing campaign made promises which it was incapable of fulfilling. Irrespective of the actual reasons for the employees' change of heart, however, the fact is that the Record provides no clue as to why they decided to seek to turn out the Union. It is totally improper now to charge the Company with having been the cause of the erosion of Union support.

No amount of exaggeration can hide the plain truth that enforcement of the bargaining order below will force employees to be subjected to a bargaining representative whom they have expressly rejected. It is also true that enforcement of the bargaining order will be a judicial license permitting a union, through the device of filing an unfair labor practice charge *after* the so-called certification year has expired, to revive and extend the certification year. The result will be to immunize a labor union from its members for a period substantially longer than the one year approved in *Brooks* v. *NLRB*, 348 U.S. 96 (1954). It is startling that the Board would describe this result as "neither a departure from established Board policy nor contrary to the law" and would attempt to bury the whole issue in a footnote (Board Br. p. 8, note 5). However, the rights of employees to "self-organize" and "to bargain collectively through representatives of their own choosing" may not be so easily disregarded and so silently eroded.

The Board has phrased the issue herein to be "whether . . . the Board properly ordered the employers to continue to recognize and bargain with the union notwithstanding its loss of employee support." The answer is clear: the order was improper and should be reversed.

CONCLUSION

For the reasons set forth in this reply brief and in the petition, a writ of certiorari should be granted.

Respectfully submitted,

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